NO. 15352

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

COUNTY OF SAN DIEGO and THE CITY OF SAN DIEGO,

v. *Appellants,*

UNITED STATES OF AMERICA,

*Appellee.*

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., a corporation, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., a corporation, and THE SALVATION ARMY,

v. *Appellants,*

COUNTY OF SAN DIEGO,

*Appellee.*

# BRIEF FOR APPELLANTS COUNTY OF SAN DIEGO AND THE CITY OF SAN DIEGO ON APPEAL

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### Statutes

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# BRIEF FOR APPELLANTS COUNTY OF SAN DIEGO AND THE CITY OF SAN DIEGO ON APPEAL

## STATEMENT OF POINTS ON APPEAL

The Statement of Points on Appeal has heretofore been set forth at page 85 of the Transcript of Record, as follows:

"1. The trial court erred in denying taxing agencies any recovery in an action where the taxes became a lien as of the first Monday in March, 1955, the United States took title June 16,

1955 and where there has not at this date been a payment out of the deposit in court.

"2. The trial court erred in construing California Revenue and Taxation Code Section 4986 as giving the United States the right to compel a cancellation not only of taxes of record against real property but also to defeat the right of taxing [201] agencies to payment of their tax demands out of deposits in court in a condemnation proceeding.

"3. The trial court erred in holding that the United States has a sufficient or any interest in the deposit in court in a condemnation award to enable it to intervene in a dispute between the defendants as to ownership or beneficial rights in such fund."

## STATEMENT OF FACTS

The action involves taxes on real property assessed by and payable to the County of San Diego and The City of San Diego for the fiscal year 1955-56. The taxes became a lien on the first Monday of March, 1955, which was March 7. The United States of America took title to the property in question on June 16, 1955 by filing its declaration of taking. On November 4, 1955 the United States of America made application to the Board of Supervisors of the County of San Diego for cancellation of said taxes, which application was by the Board of Supervisors denied on January 10, 1956. The Answer filed by appellants City and County claim as the amount of the taxes, exclusive of any penalties, interest or costs, the aggregate amount of $333,164.34 assessed to the various parcels and summarized in the Supplemental Answer, which is set forth at pages 16 and 17 of the Transcript of Record. The former owners against whom the taxes were

assessed also filed a motion to strike the answer of The City and County. The trial court, by its Judgment (Tr., pp. 65 through 82), granted summary judgment to the United States cancelling the 1955-56 general taxes and enjoining their collection (Tr., p. 79) and denying the motion of the owners to strike the supplemental answer (Tr., p. 80). The County and The City have appealed from the summary judgment cancelling the taxes and the former property owners have appealed from the judgment denying their Motion to Strike.

## STATUTES INVOLVED

**Constitution of California, Article IV, § 31:**

"The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; . . ."

**Constitution of the United States, Amendment 5:**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**U. S. Code, Title 40, § 258a:**

"The court shall have power to make such orders in respect of . . . liens . . . taxes . . . and other charges . . . as shall be just and equitable."

**California Revenue and Taxation Code, § 4986:**

"All or any portion of any uncollected tax, penalty, or costs, heretofore or hereafter levied, may, on satisfactory proof, be canceled by the auditor on order of the board of supervisors with the written consent of the district attorney if it was levied or charged:

(a) More than once.

(b) Erroneously or illegally.

(c) On a portion of an assessment in excess of the cash value of the property by reason of the assessor's clerical error.

(d) On improvements when the improvements did not exist on the lien date.

(e) On property acquired after the lien date by the State or by any county, city, school district or other political subdivision and because of this public ownership not subject to sale for delinquent taxes, and on property annexed after the lien date by the city owning it.

(f) On property acquired after the lien date by the United

States of America if such property upon such acquisition becomes exempt from taxation under the laws of the United States.

(g) On personal property or improvements assessed as a lien against real property acquired after the lien date by the United States of America, the State or by any county, city, school district or other political subdivision which because of this public ownership is not subject to sale for delinquent taxes.

" 'Property acquired' as used in this section shall include street easements and shall also include other easements for public use where the residual estate remaining in private ownership has a nominal value only.

"No cancellation under subparagraphs (b), (e), (f), or (g) of this section shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, collectible by county officers on behalf of a municipal corporation without the written consent of the city attorney thereof.

"No cancellation under subparagraph (g) shall be made in respect of all or any portion of any tax, or penalties or costs attached thereto, until after three years succeeding the lien date of such tax on personal property or improvements and then only if in the opinion of the county auditor and the board of supervisors the remaining real property under the assessment is not of sufficient value to secure payment of the taxes on such personal property or improvements."

**California Revenue and Taxation Code, § 4986.2:**

"All or any portion of uncollected city taxes, penalties or costs may be canceled on any of the grounds specified in Section 4986. If the city taxes are collected by the county, the procedure

outlined in Section 4986 for the cancellation of taxes, penalties or costs shall be followed, except that the consent of the city attorney, in lieu of the consent of the district attorney, is necessary before cancellation. If the taxes are collected by the city, the taxes, penalties, or costs shall be cancelled by the officer having custody of the records thereof on order of the governing body of the city, with the written consent of the city attorney."

**California Revenue and Taxation Code, § 2192:**

"All tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied."

**California Revenue and Taxation Code, § 16:**

" 'Shall' is mandatory and 'may' is permissive."

**California Revenue and Taxation Code, § 3003:**

"Where delinquent taxes or assessments are not a lien on real property sufficient, in the judgment of the assessor or the board of supervisors, to secure the payment of the taxes or assessments, the county may sue in its own name for the recovery of the delinquent taxes or assessments, with penalties and costs."

**California Code of Civil Procedure, § 1252.1:**

"At the time of commencement of the trial of any condemnation action in which a public agency exempt from taxes is the plaintiff, the clerk of the court shall serve upon the officer or officers responsible for the computation of all ad valorem taxes on the property being condemned, written notice to prepare and file with the clerk of the court a certificate of all delinquent taxes,

penalties and costs, and of all current taxes, due and payable on said property as of the date said notice was served. There shall be filed by the clerk with the court, as part of the records in said action, a copy of said written notice with the acknowledgment of service and the date thereof endorsed thereon by the officer so served. For the purposes of this section, the term taxes shall include ad valorem special assessments levied and collected in the same manner as other taxes. In the event said notices are served at a time when the amount of the current taxes, which are a lien on the property but not yet payable, are not known to the certificating officers, said certificates shall contain, in lieu of a statement of the current taxes, a statement based on (1) the assessed value for the current year of the property being condemned, and (2) the tax rate for the previous fiscal year. Said certificates shall be filed with the clerk of the court, as a part of the records and files of said condemnation action, within 10 days after the service of said notices, and in the event of failure on the part of any officer upon whom such notice is served to file said certificates within said time, it shall be conclusively presumed that as to the taxes for the collection of which such officer is responsible, no taxes are due and payable on said property, or in any manner constitute a lien thereon.

"Before making any final order of condemnation in such action, the court shall determine whether said certificates have been filed by all officers upon whom the notices have been served. If said certificates have been filed, the court shall as a part of the judgment direct the payment to the tax collecting agencies, out of the award, the amounts of the delinquent taxes, penalties and costs, and the amounts of the current taxes, shown by said certificates to be due and payable. In the event said certificates show that the amounts of current taxes which are a lien are not known,

and in lieu of the statement of current taxes contain a statement based on the assessed value for the current year and the tax rate for the previous year, the court shall in lieu of directing the payment of current taxes order the payment of sums bearing the same relation to the amounts shown in said statements as the portion of the current fiscal year from the commencement thereof to the date of the final order of condemnation bears towards an entire fiscal year; provided, that in the event an order permitting the plaintiff to take immediate possession was entered in such action, prior to the payment of any taxes for the fiscal year during which said order was entered, the court shall, for such fiscal year, order the payment of a sum bearing the same relation to the amount of the taxes for such fiscal year, or in the event said amount is not known, to the amount shown in said statement based on the assessed value for the current year and the tax rate for the previous year, as the portion of such fiscal year from the commencement thereof to the date of entry of such order of immediate possession bears towards an entire fiscal year.

"In any such action, the payment of the sums ordered by the court to be paid shall be considered to be in lieu of all taxes, current and delinquent, and all penalties and costs, due and payable with respect to the property being condemned, and said judgment shall, in addition to ordering said payments, order the cancellation, as of the date of the judgment, of all taxes, current and delinquent, and all penalties and costs, on said property. Said judgment shall be conclusively binding on all tax collecting agencies upon which the notices were duly served by the clerk of the court.

"The subject of the amount of the taxes which may be due on any property shall not be considered relevant on any issue in

such condemnation action, and the mention of said subject, either in the voir dire examination of jurors, or during the examination of witnesses, or as a part of the court's instructions to the jury, or in argument of counsel, or otherwise, shall constitute grounds for a mistrial in any such action. [Added by Stats. 1953, ch. 1792, § 1.]" [Repealed by Stats. 1955, ch. 1229, § 1, effective September 1, 1955.]

## BRIEF

### Taxes Payable from Condemnation Deposit

1. The County of San Diego and The City of San Diego take the position that their tax obligations which became a lien as of March 7, 1955 are entitled to be paid out of the funds deposited by the Government in court where the United States became the owner on June 16, 1955. The Government bases its right to cancellation on the provisions of Section 4986 of the Revenue and Taxation Code of the State of California. But for its alleged privilege as a governmental agency to compel local governments to cancel valid tax liens against their will, or in the absence of the exercise of such privilege, it seems clear that the taxes are a valid obligation and must be paid out of the award. *U. S.* v. *Alabama,* 313 U. S. 274; *U. S.* v. *Certain Parcels,* 44 F. Supp. 936; *Collector* v. *Ford Motor Co.,* 158 F. 2d 354.

Many cases on this point are collected in the annotation at 45 ALR 2d 522. See also:

*U. S.* v. *Certain Parcels,* 130 F. 2d 782
*Coggeshall* v. *U. S.,* 95 F. 2d 986
*U. S.* v. *Certain Lands,* 49 F. Supp. 225
*Cobo* v. *U. S.,* 94 F. 2d 351

*Richard T. Green Co.* v. *Chelsea,* 149 F. 2d 927
*City of Santa Monica* v. *Los Angeles County,* 15 Cal. App. 710
*Estate of Backesto,* 63 Cal. App. 265
*Reeve* v. *Kennedy,* 43 Cal. 643

**Cancellation Not Applicable to Condemnation Proceeds.**

2. The Government and the trial judge relied with respect to the right of cancellation upon the provisions of the California Revenue and Taxation Code, Section 4986, and the California cases holding that such right of a governmental agency to cancel is mandatory.

Despite the fact that the statute says that the taxes *may* be canceled by the auditor on order of the board of supervisors, the earlier cases have held that such a right, when claimed by one local governmental agency in California against another, is mandatory and not discretionary. The cases so holding include *City of Los Angeles* v. *Board of Supervisors,* 108 Cal. App. 655 and *City of Los Angeles* v. *Ford,* 12 Cal. 2d 407. These cases, however, have been greatly weakened and in all probability superseded by:

*Sherman* v. *Quinn,* 31 Cal. 2d 661
*Vista Irrigation District* v. *Board of Supervisors,* 32 Cal. 2d 477
*Security First National Bank* v. *Board of Supervisors of Los Angeles,* 35 Cal. 2d 323.

The last three cases hold that mandamus is not a proper remedy to compel cancellation of a tax. Instead the sole remedy of the person seeking relief, which in the case of the Vista Irriga-

tion District was a governmental public agency, is to pay the tax under protest and sue for its recovery. To the extent of inconsistency with the more recent decisions of the California Supreme Court, the cases relied on by the Government are necessarily overruled. It now appears that the right of cancellation no longer exists. Appellants also direct the following arguments against the contentions of the United States:

a. The cases cited by the Government dealt with the statute when it was a part of the Political Code as Section 3804a. The reenactment of the same statute as Section 4986 of the Revenue and Taxation Code must be read in the context of Section 16 of the same Code providing that "shall" is mandatory and "may" permissive. There was no comparable aid to interpretation in the former Political Code.

b. The California court in its decisions was dealing with agencies which had no power to acquire title in a condemnation action prior to judgment. A public agency, whether Federal, State or local, may purchase land in the open market; having done so, the State of California makes a contribution or a gift to such public agency of some or all of its tax funds and tax funds of local agencies by permitting or requiring the cancellation of past due taxes or any taxes which became a lien prior to acquisition of title by the taxing agency, thus assisting all public agencies to acquire real property more expeditiously and economically. If, however, the public agency proceeds in the California courts it must recognize and pay the liens, claims and demands of taxing agencies as well as other encumbrances, since it is dealing adversely with the condemnees and cancellation of taxes would benefit only the condemnee and not the condemnor. Land valuation is then established not by negotiation and agreement but in an adversary trial.

There is no provision under the California law whereby a condemnor in eminent domain may acquire title prior to the final judgment which determines just compensation and apportions it among the parties entitled thereto. Title 40, U. S. Code, § 258a, in providing for the taking of title in advance of final judgment, has no counterpart in the State law. Therefore a condemnor, as contrasted with a purchaser, cannot obtain cancellation of outstanding taxes. Thus, if a California city buys land on the open market, it may petition the board of supervisors to cancel outstanding taxes. If, however, the city cannot reach an agreement with the former owner, the County is entitled to payment of its tax obligations out of the condemnation award. *Weston Investment Co.* v. *State of California,* 31 Cal. 2d 390; *City of Los Angeles* v. *Superior Court,* 2 Cal. 2d 138; *Marin Municipal Water District* v. *North Coast Water Company,* 40 Cal. App. 260. The lien of taxes is held to be transferred from the land to the award on deposit with the court. *Wilson* v. *Beville,* 47 AC 857 at 860, citing and following *Thibodo* v. *U. S.,* 187 F. 2d 249. See also *Dawson County* v. *Hagen,* 177 F. 2d 186; *U. S.* v. *111,000 Acres,* 155 F. 2d 683; *U. S.* v. *412.715 Acres,* 60 F. Supp. 576.

Although the California Attorney General has not maintained a fully consistent position in the matter, he implies in his opinion No. 5035, printed in Vol. 2, p. 103 of Opinions of the Attorney General of California, that the right of cancellation under Section 4986 as to the United States is not applicable where the United States has deposited the purchase price in the registry of the court. Because of the importance of that opinion it is attached hereto as Exhibit A (See Appendix). Later opinions of the California Attorney General are not inconsistent in result. *2 Ops. Cal. Atty. Gen. 526* dealt with the State Veterans Welfare Board. *4 Ops. Cal. Atty. Gen. 308* dealt with a public utility district organized under State laws. *6 Ops. Cal. Atty. Gen. 72* dealt

with cancellation of tax liens on property acquired by a school district. In none of the three latter opinions was there involved a deposit of money in the registry of a court; instead, title and ownership in the public agency was acquired by purchase. Appellants also urge that all of the opinions of the Attorney General here involved were prior to, and consequently could not evaluate the effect of, Sherman v. Quinn, *supra,* and Vista Irrigation District v. Board of Supervisors, *supra.*

Of the authorities cited and relied upon by the California Attorney General in the opinion attached hereto as an Appendix, the following have the most compelling effect:

*California Constitution,* Article IV, § 31
*Estate of Stanford,* 126 Cal. 112
*Trippett* v. *State,* 149 Cal. 521
*Estate of Potter,* 188 Cal. 55

The California Constitution prohibits the gift by the State or any subdivision of anything of value for a private purpose. The cancellation of taxes on property acquired by a public body for public purposes does not offend the section. Such public bodies can exercise the privilege for public benefit in that they are thereby enabled to acquire property more cheaply and readily by purchase. If, however, valuation is contested in court, the cancellation is solely for the private benefit of the former owners and the attempted construction by the District Court of Section 4986(f) of the Revenue and Taxation Code is in violation of Section 31 of Article IV of the California Constitution.

c. In this connection, these appellants urge that possibly the United States may have or should be recognized to have a right with respect to the real property which it has acquired, as distinct from any right to control or interfere with disposition of

the deposit. The authorities holding that the passing of title effects a transfer of the lien from the land to the deposit would indicate that the United States has become the absolute owner of the real property, that no liens remain effective against the land itself. This, however, does not justify the district court in denying appellants their right to receive the amount of taxes which are justly and properly payable to them out of the condemnation award.

d. It remains an open question in California specifically not determined by the California Supreme Court, whether a cause of action for the taxes remains against the former owner personally after the land which is the subject of the taxes has become exempt. *Weston Investment Co.* v. *State of Califonia,* 31 Cal. 2d 390 at 392. As pointed out in that opinion, the right to sue is conferred by Revenue and Taxation Code § 3003. The statute which formerly forbade such action as to taxes secured by real property, § 3001, was repealed in 1943. Appellants therefore urge that the trial court acted in excess of its jurisdiction and without any authority in prohibiting collection of the tax obligation from the landowners by personal action. It was therefore erroneous for the trial court here to give judgment (Tr. p. 79, 82) precluding further action against the taxpayers personally. The remedy of the Government should be limited to a declaration that the lien has been transferred from the land to the deposit.

**United States Not Interested in Distribution of Deposit.**

3. The Federal courts have many times recognized and approved the policy of the United States not to participate in disputes between claimants to a condemnation award. Instead, it has often been said that the government maintains a neutral

position and has no interest in the manner of distributing the award.

*U. S.* v. *Dunnington,* 146 U. S. 338
*U. S.* v. *111,000 Acres,* 155 F. 2d 683
*Cobo* v. *United States,* 94 F. 2d 351
*U. S.* v. *412.715 Acres,* 60 F. Supp. 576
*U. S.* v. *232.68 Acres,* 57 F. Supp. 891
*U. S.* v. *Certain Lands in Eau Claire,* 49 F. Supp. 225
*U. S.* v. *19,553.59 Acres in Cheyenne County,* 70 F. Supp. 610, affirmed 154 F. 2d 866
*City of St. Paul* v. *Certain Lands,* 48 F. 2d 805
*U. S.* v. *Certain Lands,* 129 F. 2d 918
*U. S.* v. *Adamant Co.,* 197 F. 2d 1.

The Government is further unsound and inaccurate in assuming that the taxes are imposed for a fiscal year. The law of California is well settled that the lien of a real property tax attaches as an indivisible whole at the instant of 12 o'clock noon of the first Monday in March. The taxpayer is not relieved of any duty of payment by the loss or destruction of the property taxed immediately after the lien date. Cases clearly demonstrating the force of this view are accepted and recognized in *United States* v. *Certain Parcels,* 44 F. Supp. 936, where the court cites and relies on *City of Los Angeles* v. *Superior Court,* 2 Cal. 2d 138, and *Marin Municipal Water District* v. *North Coast Water Company,* 40 Cal. App. 260, and particular reliance was placed on *United States* v. *Alabama,* 313 U. S. 274.

With further reference to the supposed duty of the Government to intervene to the injury of local taxing bodies, particular attention is called to the case of *City of Pasadena* v. *Chamberlain,* 1 Cal. App. 2d 125 at 133, where the court said:

"With reference to the city and county taxes past due on the property, it is urged that under Political Code, Section 3804a, such taxes would be discharged and canceled upon application to the body imposing them. (*City of Los Angeles* v. *Board of Supervisors,* 108 Cal. App. 655 [292 Pac. 539].) They are not so canceled nor otherwise affected until and unless the body seeking relief from such taxes has complied with the provisions of the section just cited and has made application for such cancellation. (*People* v. *Board of Supervisors,* 126 Cal. App. 670 [15 Pac. (2d) 209].) Petitioner has not sought cancellation nor reduction of the past due taxes here in question, but has proposed by the bonds here assailed to provide funds to pay them. Our attention has not been directed to any authority which would construe the provisions of Political Code, Section 3804a, permitting such an application for relief from taxes, as requiring the body entitled thereto to make such a request. Such unpaid taxes do not dissolve by merger in the greater estate upon acquisition of tax title by the city. (*City of Santa Monica* v. *Los Angeles County,* 15 Cal. App. 710 [115 Pac. 945].) The interest of the city and county in the land by reason of unpaid taxes continues unimpaired and undiminished unless the taxes are paid or canceled."

See also *San Gabriel Land and Water Co.* v. *Witmer Bros. Co.,* 96 Cal. 623; *County of San Diego* v. *County of Riverside,* 125 Cal. 495; and the Opinion of the Attorney General appended hereto.

**Due Process of Law.**

4. Appellants further suggest that the effort made by the Government to interfere with the vested rights of the County and The City is an attempted infringement of the provisions of the 5th Amendment to the United States Constitution and would amount to the taking of property of local political bodies without just compensation. This position has support in *U. S.* v. *Wheeler Township,* 66 F. 2d 977 at 987 and cases there cited, notably

*Monongahela Navigation Co.* v. *U. S.,* 148 U. S. 312.

The trial court has therefore permitted the Government to intervene for the sole benefit and profit of private litigants, who could not obtain a cancellation of taxes in their own behalf. The Government, as previously urged, should be granted only a declaration that it holds the land free and clear of the tax lien, but permitting recovery by the appellants from the deposit in court.

**Cross-Appeal of Owners of Property.**

5. With respect to the appeal of the former owners from the denial of their Motion to Strike, it is submitted that the district judge was manifestly right in holding that such defendants are not entitled to relief under the provisions of Section 1252.1 of the California Code of Civil Procedure. It would appear more appropriate for these appellants to reserve argument on the point until the briefs of the cross-appellants are filed, except to call attention to the trial court's opinion, found at Transcript of Record, pages 63 through 65. These appellants will urge that the statute is to a large extent unintelligible and unworkable and for that reason has been repealed; that it violates California Constitution, Article IV, Section 31; that in any event its operation was primarily procedural rather than substantive, and therefore that the repeal of the statute precludes its application in favor of cross-appellants.

## CONCLUSION

It is therefore respectfully submitted that the Judgment should be reversed with directions to recognize the tax obligations of the appellants County of San Diego and The City of San Diego for the fiscal year 1955-56 as justly enforceable obligations and as such payable from the deposit in the registry of the court.

Respectfully submitted,

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# APPENDIX

## EXHIBIT A

**Opinion NS-5035—August 9, 1943**

SUBJECT: TAXATION, DISCUSSION OF DUTIES OF COUNTY ASSESSOR AND RIGHTS OF COUNTY TO ITS TAXES WHERE THE UNITED STATES ACQUIRES TITLE TO PROPERTY IN A CONDEMNATION PROCEEDING.

**Attorney General's Opinions**

PREPARED FOR: DISTRICT ATTORNEY OF SOLANO COUNTY, FAIRFIELD.

PREPARED BY: H. H. LINNEY, ASSISTANT ATTORNEY GENERAL.

In your letter of May 26 you ask whether I concur in advice given by you to certain county officials concerning questions relating to the lien of taxes on property acquired by the United States through condemnation proceedings. You state that the United States, after acquiring the property, is entitled to have the taxes and liens cancelled, but that the Government has adopted the policy of "requiring all taxes which are a lien on such properties to be paid by the owner or else deducted from the moneys due for damages, as fixed by the judgment of condemnation."

You state that you have advised as follows:

1. The liability of property owners for taxes is fixed as of the date when title vests in the United States.

2. The county is entitled to taxes, interest and penalties, to the date when title vests in the United States, but not thereafter.

3. Title vests in the United States:

(a) On the date of the taking when the defendant stipulates in writing waiving any defense to the government's action and agreeing to the compensation.

(b) Otherwise title vests on the date of the judgment of condemnation.

4. That a provision of the judgment that title shall vest, *nunc pro tunc*, as of the date of the previous order of taking, does not affect the right of the county to taxes which are a lien and due and payable on the date of entry of the judgment.

5. Based upon the foregoing you have advised the assessor to enter on his roll all property in private ownership on the first Monday in March, regardless of any order of taking then made, except as set forth above, presumably in 3(a).

6. If, on the first Monday in March, the assessor has actual notice of a judgment of condemnation rendered and entered prior to that date by a Federal Court, you advise that the property be left off the roll, even though the judgment has not been recorded in the office of the county recorder.

7. If after the first Monday in March and before the first day of the following November title vests in the United States, you advise that the property be entered on the roll, even though action be pending and an order of taking be made prior to the first Monday in March.

However, you state that in such circumstances your opinion is that the taxes cannot be collected, citing *United States* v. *441549 Square Feet*, 41 Fed. Supp. 523.

I do not believe it is necessary to discuss in detail all of the foregoing points upon which your views have been expressed. Rather, I think, it would be more appropriate to discuss generally

the duties of the county assessor and the rights of the county to its taxes under the particular circumstances above set forth.

1. The right of the United States to petition for the cancellation of taxes on property acquired by it after the lien date is set forth in Section 4986 of the Revenue and Taxation Code. Whether, in view of Sections 2 and 16 of the code, the cancellation is mandatory is perhaps an open question.

2. In view of the government's policy of requiring payment of taxes which are a lien on property condemned it is necessary to ascertain the amount of such taxes so that the same may be paid by the owner or deducted from the condemnation award.

3. Section 258(a), 40 U. S. C. A., provides in part that:

> "The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

Section 258 provides that the condemnation procedure shall conform as near as may be to the State procedure in like causes.

Therefore, Section 14 of Article I of the State Constitution and Sections 1231 to 1266.1 of the Code of Civil Procedure, relating to eminent domain, become of some importance in this connection, especially in regard to procedure.

Section 1253 of the Code of Civil Procedure provides for a final order of adjudication and also provides that a copy of the order "must be filed in the office of the recorder of the county, *and thereupon* the property described therein *shall vest in the plaintiff* for the purposes therein specified" (emphasis supplied).

The provisions of the State Constitution and statutes are controlling except to the extent that they are modified by the Federal

statute (*United States* v. *Certain Parcels of Land*, 41 Fed. (2d) 436, at 441).

As I read Section 259(a) the filing of the "declaration" followed by the usual ex parte judgment vesting title in the United States has the effect of vesting title at that time rather than at the time the final judgment of condemnation is filed. If this is correct, then the basic date for determining tax liens is the former and not the latter date, and some modification would be required of the views expressed in the last two paragraphs of your letter preceding paragraph (4) on page 2.

4. This leaves for consideration the question of the amount to be paid as taxes when the "taking" occurs after the first Monday in March in any calendar year. By the term "taking" I refer to the filing of the declaration *and* the entry of the ex parte judgment.

There are cases which hold that where the United States acquires title to real property *after* the lien date but *before* the rate is fixed and the tax is actually levied and assessed, the tax never becomes a lien and cancellation is proper.

*Territory* v. *Perrin*, 9 Ariz. 316, 83 Pac. 261
*Gilmore* v. *Dale*, 75 P. (Utah) 932
*City and County of Denver* v. *Tax Research Bureau*, 71 P. (2d) (Colo.) 809, 811, and cases cited therein
*United States* v. *Certain Lands*, 29 F. Supp. 92.

In California the tax lien attaches on the first Monday in March and apparently the law is that the tax is collectible even though before it is actually levied (by extending it on the roll) the property is destroyed. This rule no doubt prompted the adoption in 1933 of Section 8(a) of Article XIII of the Constitution, to take care of a situation resulting from an earthquake in Southern

California on March 10 of that year.

Since the lien which attaches on the first Monday in March is to secure taxes to be levied in and for the ensuing fiscal year (July 1-June 30), it is arguable that property existing on the first Monday in March but nonexistent on the following July 1, should not be taxed. Likewise, it is arguable that any property the title to which is vested in the State or the United States prior to July 1, should not be assessable for taxes for the ensuing fiscal year. It is clear that such taxes, if assessed on property acquired by the State or the United States, cannot be collected by sale. Probably in recognition of this fact Section 3804(a) of the Political Code (Section 4986, Revenue and Taxation Code) was adopted, permitting cancellation of such taxes.

The laws in this State, however, appear to be that if property has a taxable status on the first Monday in March, it is taxable for the succeeding fiscal year regardless of a change in status, such as total destruction, or acquisition by the United States or the State, after that date.

In *San Gabriel Valley Land & Water Co.* v. *Witmer Bros. Co.* (1892) 96 Cal. 623, at 626, the court said, "The taxes for each fiscal year accrue on the first Monday of March preceding (Const. Art. XIII, Sec. 5), and when assessed, take effect and become a lien from that date (Political Code, Section 3718) * * *."

In *County of San Diego* v. *County of Riverside*, (1899) 125 Cal. 495, at 500, the court said:

> "The lien for the taxes justly leviable upon the property of a railroad company attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier. Payment is not due, of course, until the assessment has been made; but, when that has been done and the amount of the taxes ascertained, it is payable to the county in which the roadbed was included at the time when the lien attached."

In *Rode* v. *Siebe*, (1898) 119 C. 518, it was said (page 520):

"It is sufficient to say that under the constitution and laws of California the fiscal year begins on the 1st of July and ends on the 30th of June. The taxes for each fiscal year accrue on the first Monday in March preceding its commencement, and become a lien from that date upon the real property of the respective taxpayers."

In *Grant* v. *Cornell*, (1905) 147 Cal. 565, at 567, it was said:

"The lien of the tax exists by statute, and can be discharged only by payment (Pol. Code Secs. 3716, 3717), and all persons are required to take notice of that fact."

In *State* v. *Royal Cons. Min. Co.*, (1921), 187 C. 343, at 346, the court said:

"Under our system of taxation the lien therefor attaches on the first Monday in March of each year. 'Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.' (Pol. Code, Sec. 3716.) Taxes upon personal property and upon the improvements upon real property are also liens upon the real property. (Pol. Code, Secs. 3717 and 3719.) The lien attaches and remains upon the real estate until payment or sale, notwithstanding defects in the assessment, and if the sale is for any reason void, it, of course, does not discharge the lien."

At this point we refer to Section 3820 of the Political Code (Section 2901 R. & T. Code).

Under that section, as well as under Section 2901 of the Revenue and Taxation Code taxes on property not secured by real estate are due on the lien date. That is to say, such taxes are due on the first Monday in March and may be collected by the assessor

as soon as the assessments have been made (R. & T. Code, Sec. 2914).

Section 3820 was construed in the case of *Bakersfield & Fresno Oil Co.* v. *Kern County*, (1904) 144 Cal. 148, and held to be constitutional. This decision was followed in *Mohawk Oil Co.* v. *Hopkins*, (1925), 196 Cal. 148. The significance of these decisions is that the taxes were collectible even prior to the start of the fiscal year for which they were to be collected. If that was true as to taxes on possessory interests or on personal property which were not secured by real estate, it seems to follow that as to real property taxes the same *liability for payment* would arise on the first Monday in March, notwithstanding the fact that the payment of such taxes was postponed until after the start of the fiscal year.

The latest expression of our Supreme Court on this subject is in its decision in the case of *Weber* v. *County of Santa Barbara*, (1940), 15 C. (2d) 82, and in the companion case of *Dawson* v. *County of Los Angeles*, 15 C. (2d) 77.

The facts in the Weber case were substantially these:

On the first Monday in March of 1935 the plaintiff owned certain stocks and bonds then taxable under Section 3627a of the Political Code and taxes were assessed thereon and paid under protest and suit was brought against the county to recover the same. The defendant's demurrer to the complaint was sustained without leave to amend and appeal was taken from the judgment of dismissal.

The appellant contended that by reason of the enactment of the Personal Income Tax Act (Stats. 1935, page 1090) effective June 13, 1935, and the amendment to Section 3627a (Stats. 1935, p. 2251) effective September 15, 1935, the taxes imposed on her intangibles were illegally imposed and collected.

Section 3627a, as amended, provided that if and when a net

income tax should be adopted intangibles, except solvent credits, should no longer be taxable. A saving clause read as follows:

> "Provided, however, that any and all taxes imposed on such property prior to the passage or adoption of such net income tax and the effective date thereof shall remain fully collectible and distributable hereunder."

In denying relief to the appellant the court said (page 86):

> "As appears from the above chronological statement, a tax was 'imposed' upon the plaintiff's stocks and bonds by the express language of Section 3627a on the first Monday of March, 1935. At the time such tax was 'imposed' there was no income tax act in existence. The latter act was not effective until June 13, 1935, though the tax therein provided for was to be computed on income derived on or after January 1, 1935. In view of this chronology, we think the conclusion is inescapable that the proviso or 'saving clause' in Section 3627a relates specifically and solely to the tax which was 'imposed' and became a lien on the first Monday of March, 1935. In adding the proviso, it was the undoubted purpose of the legislature to make it plain that the *ad valorem* tax so imposed in March, 1935, prior to the enactment of the income tax but subsequent to the date from which such substituted income tax was to be computed, was not to fall within the in lieu provision contained in the earlier portion of the 1935 amendment of Section 3627a. This intention clearly appears from the language employed by the legislature."

The importance of the decision so far as our present inquiry is concerned is in certain language used by the court. At page 84 the court refers to the *ad valorem* tax imposed as of the first Monday in March by Section 3627a prior to the 1935 amendment and states that this tax "was immediately due and payable except when, by virtue of the provisions of Section 3717 of the same code, it became a lien on any real property of the taxpayer, which

lien attached as of the same date." And at page 87 the court said:

> "Aside from our conclusion that the legislature clearly evidenced its intention to save and to make 'fully collectible and distributable' such *ad valorem* taxes as had been imposed on intangible personal property in March, 1935, prior to the enactment of the substituted income tax, we are also of the view that a statute (such as the 1935 amendment of Sec. 3627a) releasing property from a particular form of tax should be strictly construed against the taxpayer. (*Hunton* v. *Commonwealth*, 166 Va. 229 (183 S. E. 873).) Such a statute differs from one imposing a tax which is construed liberally in favor of the taxpayer. Here we find no clear legislative expression vitiating the already imposed 1935 *ad valorem* tax on intangible personal property, assuming such power rests in the legislature. Such intention certainly should not be implied. In fact, as already shown, the legislative intention appears to be clearly to the contrary."

By use of the words "assuming such power rests in the legislature" we think the court must have had in mind the well-established principle that the legislature cannot constitutionally forgive taxes which have already accrued and become payable, since to do so would violate the gift provision of Section 31 of Article IV of the Constitution.

See *Estate of Stanford*, 126 Cal. 112
*Trippett* v. *State*, 149 Cal. 521
*Estate of Potter*, 188 Cal. 55.

Assuming then, as I feel we must do, that if property is taxable on the first Monday in March, the taxes thereafter assessed thereon become a lien as on that date, it follows that these taxes must be either paid by the owner of the property on the first Monday in March, or paid out of the condemnation award. In view of the case the date of the taking by the United States, if on or after the first Monday in March, is immaterial.

If the property owner does not pay the taxes and thus avoid the automatic imposition of penalties, these penalties will attach upon the dates provided therefor by law and will be payable out of the award.

It will be to the taxpayer's interest, therefore, to see that current taxes are paid prior to the accruing of penalties, and if necessary he should personally advance the funds for this purpose instead of assuming that the taxes would be paid out of the award prior to penalty dates. Such an assumption might be contrary to the facts as it might take the court considerable time to make its final decree and order for payments out of the award. The important thing to be borne in mind is that the deposit of an amount in court does not of itself constitute a payment of the taxes, and that the dates for payment are fixed by statute and penalties attach as of certain other dates.